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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

RAILWAY LABOR EXECUTIVES' ASSOCIATION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Appellants,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

On Appeal From the United States District Court for the Middle District of Florida, Jacksonville Division

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Railway Labor Executives' Association and the Brotherhood of Locomotive Engineers appeal from the judgment of the United States District Court for the Middle District of Florida, Jacksonville Division, entered on June 8, 1966 (R. 3185), denying the prayer of the appellants to enjoin, annul, suspend, and

set aside orders of the Interstate Commerce Commission, dated December 2, 1963 and March 4, 1964, and submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court for the Middle District of Florida, Jacksonville Division, is not yet reported. Its opinion and judgment are reproduced as Appendix A to the Jurisdictional Statement filed in No. 638 by appellant Florida East Coast Railway Company (to which reference herein will be made as follows; "FEC App. p. 1a", etc.). The report and order of the Interstate Commerce Commission, dated December 2, 1963, is reported at 320 Interstate Commerce Commission Reports 122. The order of the Commission, dated March 4, 1964, is not reported and is reproduced as Appendix A hereto, *infra*, page 1a.

JURISDICTION

This suit was brought under Title 28 of the United States Code, Sections 1336 and 1337 (28 U.S.C.A., Sections 1336 and 1337), to enjoin, annul, suspend, and set aside orders of the Interstate Commerce Commission (R. 436). The judgment of the District Court was entered on June 8, 1966 (R. 3185), and Notice of Appeal was filed in that Court on August 8, 1966 (R. 3220). The jurisdiction of this Court to review the decision below by direct appeal is conferred by Title 28 of the United States Code, Sections 1253 and 2101(b). The following cases establish the jurisdiction of this Court to review the judgment on direct appeal here involved. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156; *United States* v. *Drum*, 368 U.S. 370.

QUESTIONS PRESENTED

This appeal presents the following questions:

1. Did the Interstate Commerce Commission misinterpret and misapply Section 5(2)(f) of the Interstate Commerce Act when it refused, in approving the merger of the Seaboard Air Line Railroad and the Atlantic Coast Line Railroad, to provide protection to employees of the Florida East Coast Railway, the Central of Georgia Railway, and the Southern Railway who will be adversely affected by such merger?

2. Did the Interstate Commerce Commission misinterpret and misapply Section 5(2)(f) of the Interstate Commerce Act when it refused, in approving the merger of the Seaboard Air Line Railroad and the Atlantic Coast Line Railroad, to provide protection to employees of the applicants, who will be adversely affected by coordinations undertaken pursuant to such approval during the fifth year following the effective date of the Commission's order?

3. Did the Interstate Commerce Commission misinterpret and misapply Section 5(2)(f) of the Interstate Commerce Act when it refused, in approving the merger of the Seaboard Air Line Railroad and the Atlantic Coast Line Railroad, to provide protection to the employees of the applicants, who will be adversely affected by reason of internal technological changes in operations resulting from the merger?

4. Did the Interstate Commerce Commission comply with the requirements of Section 5(2)(f) of the Interstate Commerce Act and of due process of law when it imposed employee protective conditions in its order approving the merger of the Seaboard Air Line Rail-

road and the Atlantic Coast Line Railroad different from the protective conditions proposed by either the employees or the applicants and without findings to support the imposition of such different conditions and without substantial evidence to support such conditions?

STATUTES INVOLVED

Sections 5(2)(a), 5(2)(b), 5(2)(c) and 5(2)(f) of the Interstate Commerce Act (49 U.S.C.A., Sections 5(2)(a), 5(2)(b), 5(2)(c) and 5(2)(f)) are involved and are reproduced in Appendix B, *infra*, pages 4a-6a.

STATEMENT

The orders of the Interstate Commerce Commission, which are the subject of this litigation, were entered in an administrative proceeding identified as *Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad Company*, 320 I.C.C. 122. These orders approved, subject to conditions, the merger of the properties and franchises, including motor carrier operating rights, of Atlantic Coast Line Railroad Company into the Seaboard Air Line Railroad Company for ownership, management and operation, and various other transactions relating thereto (R. 393-398).[1]

The proposed merger is subject to the provisions of Section 5(2) of the Interstate Commerce Act (49 U.S.C.A., Section 5(2)), subparagraph (b) of which authorizes the Commission to approve the transaction if it is found to be consistent with the public interest upon terms and conditions and with modifications

[1] This administrative proceeding originated with the filing of an application by the Seaboard and the Coast Line on July 22, 1960, for authority to merge their properties and franchises (R. 206).

found to be just and reasonable. Subparagraph (c) provides that in passing upon the proposed merger the Commission shall give weight, *inter alia*, to "the interest of the carrier employees affected". In addition, Section 5(2)(f) of the statute provides that if the Commission approves the merger it shall as a condition thereof require a fair and equitable arrangement to protect the interests of the railroad employees affected.[2] This subparagraph reads as follows:

> "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

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[2] The applicable provisions of Section 5(2) are quoted in full in Appendix B, *infra*, pages 4a-6a.

Section 17(11) of the Interstate Commerce Act (49 U.S.C.A., Section 17(11)) provides that representatives of employees of carriers may intervene and be heard in any proceeding arising under Chapter I of the statute in which Section 5(2) is found. The bulk of the employees of the Seaboard and the Coast Line as well as those of the Florida East Coast Railway Company, the Central of Georgia Railway Company, and the Southern Railway Company, all of which would be affected by the merger, are represented for the purposes of the Railway Labor Act (45 U.S.C.A., Section 151 et seq.) by the Brotherhood of Locomotive Engineers and the twenty-three other standard railway labor organizations affiliated with the appellant Railway Labor Executives' Association (R. 116). These organizations are:

> American Railway Supervisors Association; American Train Dispatchers' Association; Brotherhood of Locomotive Firemen and Enginemen; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railroad Trainmen; Brotherhood Railway Carmen of America; Brotherhood of Railway and Steamship Clerks; Brotherhood of Sleeping Car Porters; Hotel and Restaurant Employes and Bartenders' International Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers and Blacksmiths; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; International Organization Masters, Mates and Pilots of America; National Marine Engineers' Beneficial Association; Order of Railway Conductors and Brakemen; Railroad Yardmasters of America; Railway Employes' Department, AFL-CIO; Seafarers' International Union of North America; Sheet Metal Workers' International Association; Switchmen's Union of

North America; and Transportation-Communication Employees Union.

This Court has recognized the Association as the proper party to appear and speak for these organizations and the railroad employees they represent. *Interstate Commerce Commission* v. *Railway Labor Executives' Association,* 315 U.S. 373; *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142; *American Trucking Associations, Inc., et al.* v. *United States,* 355 U.S. 141. The Association (which then included the Brotherhood of Locomotive Engineers), therefore, intervened in the administrative proceedings on the merger application to present the employees' interest (R. 435).

It is clear that the merger will adversely affect a substantial number of railroad employees. These include employees of the Seaboard and the Coast Line who would lose their jobs through the abolition of 4255 positions within five years after the merger as well as at least 4439 other employees who would be required to change their places of residence in order to retain employment and who would either suffer demotions or other adverse effects flowing from such transfers (320 I.C.C. 199, 200).[3] It would also include a substantial number of employees of the Florida East Coast Railway Company, the Southern, and the Central of Georgia, whose employers would be required to reduce their employee rolls as a consequence of the competitive impact of the merger (Exhibit "B" to FEC Complaint, pages 110-111; 320 I.C.C. 203-204; R.

[3] The Association presented evidence that some 8839 employees of the applicants would be required to move their residences. While the Commission did not accept this figure, it did not find any precise number of job transfers that would result (320 I.C.C. 200).

313-314). The Commission recognized these adverse effects of the proposed merger (320 I.C.C. 199, 205; R. 308). It found, *inter alia*, that "Unfortunately, approval of the application here will have substantial adverse effects upon many railroad employees and their families". It went on to find, however, that these adverse effects upon employees alone, or combined with other possible adverse effects of the merger, were not sufficient to outweigh the public benefits which the Commission believed would flow from the merger. The Commission also suggested that the merger would provide greater job security for employees. It therefore declined to disapprove the merger because of the adverse effects upon employees (320 I.C.C. 200; R. 308).

The dissenting opinion of Commissioners Webb and Tucker contained the following comments on this Commission finding (320 I.C.C. at page 243):

> "There is one conclusion in the Commission's report which the more than 8,000 adversely affected employees of the applicants will probably regard as a cruel jest. I refer to the conclusion of the Commission that one of the public benefits to be derived from the merger is greater stability of employment. As previously noted, both the Seaboard and the Coast Line had more employees in 1962 than in 1961.
>
> "It is virtually impossible to devise any common scale for weighing human suffering and monetary benefits to corporations, yet section 5(2)(c) requires that appropriate weight be given to the effect of the proposed merger on employees. In those cases in which the advantages and other disadvantages of a proposed merger are in a state of near equilibrium, the adverse effect on employees should be decisive in denial of the application.

> Here, the benefits to be derived from this proposed merger are minimal, so minimal, in fact, that entirely apart from any significant lessening of competition, the adverse effect of the merger upon employees, coupled with the adverse effect upon other railroads in the region, is a sufficient ground for denial of the application."

Under these circumstances, the Commission was required under the mandate of Section 5(2) of the Interstate Commerce Act to provide fair and equitable arrangements to protect the interests of "the railroad employees affected".

At the time the Transportation Act of 1940 became effective, protection for employees adversely affected by railroad coordinations was provided by an agreement between the railway labor organizations and most of the nation's railroads identified as the "Agreement of May 1936, Washington, D. C." usually referred to as the Washington Job Protection Agreement, and by conditions prescribed by the Commission in the exercise of its discretion upon such transactions. *United States* v. *Lowden,* 308 U.S. 225; *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142. This agreement provided monetary compensation for employees displaced as a result of a railroad coordination, i.e. placed in a worse position with respect to compensation and rules governing working conditions, and for employees dismissed as a result of such coordination, i.e. deprived of employment. Such compensation was based upon length of service. An employee was also protected with respect to various benefits attached to his employment such as free transportation, pensions, hospitalization, relief and the like. The period of time during which the displacement or dismissal was re-

quired to take place in order for the benefits of the agreement to be applicable was related to the actual act of coordination, i.e. the unification, consolidation, merging or pooling of railroad facilities, operations or services. In the case of displacements, the period was 5 years from the effective date of the coordination. In the case of dismissals, the period was three years from the effective date of the coordination.[4]

After the Transportation Act of 1940 became effective, the Commission met its obligations under Section 5(2)(f) thereof by imposing conditions known as the "Oklahoma" conditions named for the proceeding in which such conditions were first imposed, i.e. *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177. These conditions adapted the provisions of the Washington Job Protection Agreement but limited the compensation thereunder to a period of four years from the effective date of the Commission's order rather than from the date of the carrier's act affecting the employee. This was done in accordance with the Commission's then interpretation of Section 5(2)(f) as limiting employee protection to four years from the date of its order.

Subsequently, the Commission was confronted with an application for the approval of a consolidation of various railroad facilities at New Orleans in which the record disclosed that many employees affected by the consolidation would not be displaced until a period beyond four years from the effective date of the Commission's order. The Commission, however, refused

[4] This agreement is included in Exhibit "C", page 1, to the complaint of the Association in the court below (R. 498).

to provide protection for such employees on the ground that Section 5(2)(f) did not permit it to do so. *New Orleans Union Passenger Terminal Case,* 267 I.C.C. 763. The Association sought judicial review of the Commission's action and this Court subsequently held that the Commission had misinterpreted the statute and had the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of its order approving a Section 5(2) transaction. *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142. On remand, the Commission "in conformity with the decision" of this Court imposed the terms of the Washington Job Protection Agreement as a condition of its approval of the consolidation there involved subject to the restriction that (a) employees adversely affected within four years from the effective date of the Commission's order should receive as a minimum the protection of the "Oklahoma" conditions, i.e. 100% compensation instead of the 60% provided by the Washington Agreement, and (b) the compensation of dismissed employees should be reduced by earnings received in other employment or under unemployment insurance laws. *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271. By the time the present merger application came before the Commission, the "New Orleans" conditions were the employee protective arrangements which the Commission, by long practice, had established as appropriate in merger transactions. *Louisville & Nashville R. Co. Merger,* 295 I.C.C. 457; *Norfolk and Western Ry. Co. Merger,* 307 I.C.C. 401; *Erie R. Co. Merger,* 312 I.C.C. 185.

While the present proceeding was in process before the Commission, that agency on November 7, 1962, approved the acquisition of control of the Central of Georgia Railway by the Southern Railway and imposed as a condition of its approval employee protective conditions which differed substantially from the "New Orleans" conditions. *Southern Railway Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557. On June 10, 1963, the Commission issued its order on reconsideration in which it purported to clarify the conditions but actually further changed them to the detriment of the employees. *Southern Railway Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 729.[5]

In the present case, the appellants sought the imposition of the "New Orleans" conditions with certain modifications to meet the requirements of Section 5(2)(f). The Seaboard and the Coast Line proposed the "New Orleans" conditions without modification (R. 114).

The Commission instead imposed the so-called "Southern-Central of Georgia" conditions. Although the Commission rejected the modification of the "New Orleans" conditions proposed by the appellants, it made no finding as to why it was appropriate to apply the so-called "Southern-Central of Georgia" conditions to the present case rather than the long stand-

[5] These conditions were the subject of judicial review in a complaint filed by the Association in the United States District Court for the Eastern District of Virginia. *Railway Labor Executives' Association* v. *United States*, 226 F. Supp. 521. The case was subsequently remanded to the Commission by this Court for clarification of its orders. *Railway Labor Executives' Association, et al.* v. *United States, et al.*, 379 U.S. 199. This "clarification" is now the subject of extensive hearings before the Commission.

ing "New Orleans" conditions advocated by the applicants and the employees. *Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line Railroad Co.*, 320 I.C.C. 122, 199-205. In its order dated March 4, 1964, upon reconsideration, the Commission included as a part of the employee conditions imposed the clarifications of the "Southern-Central of Georgia" conditions contained in its order of February 27, 1964 (R. 397, App. A, *infra*, p. 1a).

Regardless of the merits or demerits of the conditions imposed by the Commission with respect to those employees affected by the proposed merger which it did cover, the Commission's order did not protect many railroad employees affected by the merger. Thus, it did not protect employees displaced or dismissed pursuant to the Commission's approval of the merger after four years from the effective date of the Commission's order; it did not protect the employees of the Florida East Coast Railway, the Southern, and the Central of Georgia displaced or dismissed by their employers as a result of the merger; nor did it protect employees of applicants with respect to internal actions of the merged company made possible by the unification approved by the Commission, i.e. internal economies or internal technological improvements effected subsequent to the merger.

The litigation concerning the validity of the Commission's orders began when the Florida East Coast Railway, one of the rail carriers which will be injured by the impact of the merger, filed its complaint with the District Court to annul and set aside the Commission's action (R. 1). Thereafter, the Railway Labor Executives' Association intervened as a party-plain-

tiff in the litigation and filed its own complaint to annul and set aside such orders (R. 436). The complaint of the Association included all of the allegations and grounds for reversal of the Commission's action set forth in the complaint of the Florida East Coast Railway Company. In addition, the complaint contained allegations of errors by the Commission in its action with respect to the interests of the railroad employees affected by the merger (R. 444). The Southern Railway Company also intervened as a party-plaintiff. Although the United States was named as a statutory defendant in the complaints, it opposed the merger and thereby realigned itself as a party-plaintiff (FEC App. p. 2a).

On June 8, 1966, the District Court entered its judgment denying the relief sought by the complaints and granting judgment to the defendants. Pages 33 through 38 of the District Court's accompanying opinion dealt with the Commission's action with respect to the employees adversely affected by the merger and affirmed this action (FEC App. pp. 44a-50a).

The appeal of these appellants from the District Court's judgment concerns itself with those portions of the Commission's orders relating to the Commission's action under the statutory provisions relating to employees affected by the merger and the District Court's judgment affirming this action (R. 3222).

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents substantial questions with respect to the interpretation and application of Section 5(2)(f) of the Interstate Commerce Act, as follows:

A. THE COMMISSION'S ORDERS AFFIRMED BY THE DISTRICT COURT ERRONEOUSLY INTERPRETED SECTION 5(2)(f) AS AUTHORIZING IT TO DENY PROTECTION TO RAILROAD EMPLOYEES ADVERSELY AFFECTED BY THE PROPOSED MERGER

1. The Commission's Orders Erroneously Deny Protection to Railroad Employees Adversely Affected by the Proposed Merger Who Were Not Employees of the Applicants

The appellants requested that the Commission's protective conditions include all railroad employees affected by the merger, i.e. the employees of the Florida East Coast, the Southern and the Central of Georgia who would lose their jobs or be displaced as a consequence of the impact of the merger upon their employing carrier. The Commission's opinion approving the merger did not deny that there would be such adversely affected employees. Instead, it found that, although there were such employees, there was no basis for extending protection to such affected employees because they were employees of carriers outside of the transaction and there was no close-knit relationship between the carriers party to the transaction and the employers of these adversely affected employees. *Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line Railroad Co.*, 320 I.C.C. 122, 204. The District Court affirmed this holding of the Commission on the grounds that the requirements of Section 5(2)(f) are restricted to employees of the carriers involved in the transaction (FEC App. p. 50a).

This holding of the District Court and of the Commission is in square conflict with the language of the statute and with the holding of the Court in *Railway Labor Executives' Association* v. *United States*, 216 F. Supp. 101. In the latter case, the Seaboard Air Line Railroad entered into an agreement with the Richmond, Fredericksburg & Potomac Railroad Company to acquire joint control with the other railroad of the Richmond Terminal Railway and its terminal facilities in Richmond, known as the Broad Street Station. The two carriers involved in this transaction filed an application pursuant to Section 5(2) of the Interstate Commerce Act for approval of their arrangements. The application included a request for approval of trackage rights necessary for the Seaboard to operate into the Broad Street Station. The application indicated that upon approval of the transaction the Seaboard would abandon its arrangements with the Chesapeake and Ohio Railway Company for the operation of the Main Street Station in Richmond. The employees in this station were on the payroll of the Chesapeake and Ohio. As a result of the Seaboard action in abandoning the Main Street Station operation, their jobs were abolished and they either lost their jobs or were transferred. The Association requested that the Commission impose conditions on its approval of the agreements between the Seaboard and the Richmond, Fredericksburg & Potomac Railroad Company to protect the employees of the C&O involved on the grounds that they were adversely affected by the transaction. The Commission refused on the grounds that they were employees of a carrier outside of the transaction. The Association appealed this determination and it was re-

versed by the three-judge court which reviewed the Commission's order in the above-cited case. This Court held that the test of protection under Section 5(2)(f) is not who the employer may be but whether the employees involved are affected by the transaction. The Court's opinion on this point read as follows: (page 102)

> "Section 5(2)(f) commands protection of 'employees affected' by the 'transaction'. The 'transaction' here is the acquisition by Seaboard of the use of Broad Street station. The Act does not, as the Commission would say, limit its security to employees of a carrier involved in the transaction. The guardianship is not dependent upon the role of their employer in the transaction. All 'employees affected' are under the aegis of the Act. The only question is whether they are 'affected': Are they touched sufficiently by the transaction?"

Thus, when the Commission in the present case refused protection to adversely affected employees on the grounds that they were employees of carriers outside of the transaction and the District Court approved such action on the ground that Section 5(2)(f) "is restricted to the carriers involved in the transaction", the determinations were in square conflict with the holding of the three-judge court in the *Richmond Terminal* case. Neither mentioned that holding.

It is true that the Commission's opinion attempted to avoid this conflict by talking about the "proximity" of relationship of the employees. The dissenting opinion of Commissioners Webb and Tucker characterizes this effort for what it plainly is. Such dissent, after pointing to the holding by the three-judge court

in the *Richmond Terminal* case, finds as follows (320 I.C.C. U.S. 243-244):

> "The Commission pays only lipservice to that requirement. Affected employees of carriers outside the transaction are entitled to protection by virtue of their proximity or the proximity of their employer to the transaction. It would be hard to imagine a closer proximity than that which exists between the proposed transaction and the employees of carriers whose destruction is anticipated or of carriers which the report finds will suffer a substantial diversion of traffic.
>
> "There is a special reason for extending protection in this case, quite apart from any requirement of law or the great financial strength of the merged company. Those carriers that are compelled to seek refuge under condition 14 of appendix XI of the report will have a strong incentive to pare their payrolls to the bone prior to negotiating with the merged company. Employees discharged prior to the consummation of condition 14 mergers will receive no protection whatever. Also, employees of the Central of Georgia, for example, who lose their jobs as a result of traffic diversion will not be protected either under the conditions imposed when the Southern acquired control of that carrier or under the conditions imposed by the Commission in this proceeding."

Moreover, the District Court did not accept the Commission's attempted maneuver and affirmed the action solely on the ground that the Commission was not required to protect employees of carriers not involved in the transaction, even though they were adversely affected thereby, thus bringing it in square conflict with the *Richmond Terminal* decision.

The decision in the *Richmond Terminal* case is also clearly correct in its interpretation of the scope of Section 5(2)(f).

First: It is commanded by the clear language of the first sentence of Section 5(2)(f) of the statute which requires the Commission in approving Section 5(2) transactions to "require a fair and equitable arrangement to protect the interests of the railroad employees affected". *Flora* v. *United States,* 357 U.S. 63, 65; *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Company,* 353 U.S. 30, 35.

Second: The clear and unambiguous language of Section 5(2)(f) is reinforced by Section 222(f) of the Communications Act of 1934 (47 U.S.C.A., Section 222(f)), which provides for employee protection in the merger of telegraph carriers. The cited statutory provision specifically provides that in telegraph mergers protection shall be accorded only to an employee of "any carrier which is a party to a consolidation or merger". This statute was passed in 1934. When Congress subsequently enacted Section 5(2)(f) of the Interstate Commerce Act in 1940, it deliberately did not so limit protection of railroad employees in mergers or similar transactions. This Court cited the provisions of the Communications Act and the differences between such statute and Section 5(2)(f) of the Interstate Commerce Act in determining the type of protection provided by the latter statute. *Brotherhood of Maintenance of Way Employes, et al.* v. *United States,* 366 U.S. 169, 175. In that case, the differences between the two statutes worked against the employees' contention that Section 5(2)(f) required job protec-

tion in contrast to financial compensation. Here, the differences between the two statutes clearly support the employees' position that the protection accorded by Section 5(2)(f) is not limited to employees of applicants or carriers involved in a transaction.

Third: The Commission's position is contrary to that which it took before the Supreme Court in *Brotherhood of Maintenance of Way Employes, et al.* v. *United States,* 366 U.S. 169, to which reference is made in its decision in this case. In that case, the Commission advised this Court in its brief that (a) the first sentence of Section 5(2)(f) constitutes a *broad grant* of discretion to the Commission to do what it deems necessary in the circumstances to "aid those who are 'affected' and hence faced with losses" (Br. 15) and that it thus undertakes "to provide protective conditions or benefits for those *who are in fact adversely affected*" (Br. 20);[6] and (b) the second sentence requires that those "*who are economically injured* in consequence of a Section 5 transaction" receive full benefits (Br. 11).[7]

It is submitted that it is inconsistent for the Commission on the one hand to advise this Court for the purpose of impressing upon the Court the broad scope of the protection provided by Section 5(2) in support of its view that the Section does not mandatorily require job protection, that the statute provides a program for protecting *all* railroad employees who are adversely affected or who are economically injured in consequence of a Section 5(2) transaction, and to now

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[6] Emphasis supplied.

[7] Emphasis supplied.

take the position that such Section does not protect adversely affected employees of carriers who are "outside" of the transaction.[8]

2. The Commission's Orders Affirmed by the District Court Erroneously Deny Protection to Employees Adversely Affected in the Fifth Year After the Merger

In *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, this Court held that the Commission had erroneously interpreted Section 5(2)(f) as limiting protection to only those employees adversely affected during a period of four years from the date of the Commission's order approving a transaction. The Court's holding on this point read as follows (page 155):

> "We conclude, therefore, that the Commission, while required to observe the provisions of the second sentence of § 5(2)(f) as a minimum protection for employees adversely affected, is not confined to the four-year protective period as a statutory maximum. The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation."

Subsequently, on remand the Commission entered an order which it described as being "in conformity with

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[8] Nor has there been any consistent application of such an interpretation by the Commission, as suggested by the District Court (FEC App. p. 49a). In fact, the Commission has applied this view only in an arbitrary manner when it has seen fit to do so. *Cf., Gulf, Mobile & Ohio Railroad Company Abandonment*, 282 I.C.C. 311; *Texas & Pacific Railway Company Operation*, 247 I.C.C. 285; *International-G. N. R. Co. Trustee Trackage Rights*, 215 I.C.C. 27; *Louisville & Nashville R. Co.* v. *United States, et al.*, 244 F. Supp. 337, aff'd *Louisville & Nashville R. Co.* v. *United States, et al.*, — U.S. —, 15 L. Ed. 2d 615 (February 21, 1966).

the decision of the Supreme Court of the United States in *RLEA* v. *United States*", and which provided protection for the employees who would be injured by consolidations taking place more than four years after the effective date of the Commission's order in that case. The Commission accomplished this purpose by imposing the Washington Job Protection Agreement as its conditions with two modifications affecting the amount of compensation received. *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271. Since the Washington Agreement contains time limitations only following the actual physical coordinations, the employees injured in the fifth year in that case were protected.[9]

The evidence before the Commission submitted by the applicants shows that a total of 350 employees will be adversely affected in the fifth year from the Commission's approval of the proposed merger. Two hundred sixty-seven jobs will be abolished during such year and 89 employees will be transferred through consolidations then made pursuant to the merger authority (Exhibit H-37, Study 10, Schedule A, page 1).

However, when the Commission imposed its protective conditions in the present case, it did not include protection for employees adversely affected beyond a period of four years after the date of the Commission's order. This interpretation of the conditions was admitted by the Commission's General Counsel before the District Court, who took the position that the restriction was valid because "the same limitation ap-

[9] This agreement appears in the Record at page 1 of Exhibit C to the Complaint of the Association in the District Court (R. 498).

pears in New Orleans" (page 413 of Oral Argument before District Court on July 18, 1964).

The District Court on the other hand affirmed the Commission's orders on the grounds that the conditions imposed (which it referred to as *Southern Railway* conditions) protected employees adversely affected during the first five years after the effective date of the Commission's order (FEC App. p. 47a). The District Court's finding was based upon an interpretation of the conditions here imposed made by the Commission's General Counsel at the further hearing before the three-judge court on February 24, 1966, at page 143 of the Transcript.[10] However, the statement to which the District Court refers must be read in the light of the extensive discussion on this point by the same General Counsel in the original hearing before the District Court in which he explained that the employee had to be adversely affected within the four-year period but could receive compensation beyond that period. In this statement, he made clear that an employee first affected beyond the four-year period, as is the case of the 350 employees here involved, would not receive protection under the Commission's conditions. This discussion takes place at pages 412-414 of the Transcript of the oral argument on July 18, 1964. The argument of the Commission's General Counsel there is to the effect that the Commission had not changed the "New Orleans" conditions with respect to protection of an employee affected in the fifth year; that in the "New Orleans" conditions the Commission had given the employees what they requested; and finally that the adverse effect must occur within the four-year period under the "New Orleans" condi-

[10] See footnote 42 of the District Court's decision.

tions. This clearly appears from the statement of the General Counsel at page 414 of such Transcript in that hearing, which reads as follows:

> "But under the provisions which they themselves proposed on remand from the Supreme Court in RLEA, *the employee had to be adversely affected, first, adversely affected within the four-year period. And in the reopened New Orleans proceedings, the Commission gave them exactly what they wanted, practically verbatim.*
>
> "It said that the Washington protection would apply to employees adversely affected within four years from the effective date of the order approving the transaction.
>
> "So there is no departure here from the corresponding provisions of the New Orleans. It was the same provision in L&N and M. & St. L., no objection; same thing in Erie-Lackawanna merger, no objection.
>
> And of course, the minimum protection required by Section 5(2) is measured in terms of four years from the effective date of the order; but, of course, even here, if the man is affected within four years, his protection may go on, depending upon the circumstances, for two or three more years." (Emphasis supplied.)

There can thus be no question that the conditions which the Commission here imposed, as interpreted by its General Counsel, do not protect the 350 employees which the evidence shows will be adversely affected in the fifth year after approval of the merger and that the Commission's defense of this failure to protect these adversely affected employees rests entirely on the argument that this is what was done in New Orleans on remand. This defense is wholly without substance.

First, it was not accepted by the District Court which interpreted the "New Orleans" conditions as protecting employees adversely affected beyond the four-year period. The District Court's finding on this point reads as follows: (FEC App. p. 41a).

> "In the *New Orleans Union Passenger Terminal* case, 282 I.C.C. 271, the Commission went a step further and extended financial compensation beyond the four-year period provided in the *Oklahoma* conditions."

Second, the argument makes no sense in the context of the litigation concerning the "New Orleans" conditions. That litigation, as shown by this Court's decision, arose out of the fact that the Commission's order "disclosed that many employees affected by the consolidation would not be displaced until the completion of the project and that, therefore, they would receive no compensatory protection". The date for the completion of the project was four years after the date of the Commission's order. Therefore, the injury over which that litigation occurred was injury involving employees adversely affected thereafter. *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142 at pages 144, 145. It was the Commission's interpretation that these employees were not covered by Section 5(2)(f) which this Court reversed. On remand, the Commission's recital of the facts clearly showed that a substantial number of employees would be affected during the fifth year after the date of the Commission's order. Moreover, the action which the Commission there took was stated by it to be "in conformity with the decision of the Supreme Court of the United States". *New Orleans Union Passenger*

Terminal Case, 282 I.C.C. 271, 276, 281. To now contend that the Commission did not in effect provide protection for employees affected in the fifth year and that it did not do so at the specific request of the Association is an incredible argument. It can only be explained in terms of the total confusion and chaos which have resulted from the Commission's attempts to re-form the "New Orleans" conditions without any evidence and in a manner not suggested by any party to this case.

Third, the Commission's 1966 interpretation is contrary to the two arbitrations which have taken place under the "New Orleans" conditions. Copies of these arbitration decisions which were submitted to the District Court are attached hereto as Appendices C and D. They show that one employee was given compensation under the "New Orleans" conditions who was first affected five years and 11 months after the effective date of the Commission's order. The other employee was first affected six years and nine months after the effective date of the Commission's order.

It is clear that it was the duty of the Commission to provide protection for the 350 employees who would be adversely affected in the fifth year after the effective date of the Commission's order. It is equally clear from the Commission's defense of this action that it has not done so. The District Court's decision, based on the assumption that it had done so, simply adds to the confusion already surrounding these conditions. The situation requires this Court to review the conditions with respect to the requirements of the statute and to make clear that the Commission must meet those requirements.

3. The Commission's Orders Affirmed by the District Court Erroneously Exclude Protection to Employees Adversely Affected by Internal Changes Made Possible Only by the Merger

The Commission in this case simply adopted the so-called "Southern-Central of Georgia" conditions by reference. These include those conditions as interpreted by the Commission's report of June 10, 1963. in the *Southern Railway Co.—Control—Central of Georgia Railway Co.* case (Exhibit D to the Complaint; R. 526). At pages 6 and 7 of that report the Commission states that it is not its intention that employees adversely affected by internal technological improvements made by the applicants shall be entitled to the benefit of protection even if such improvements result from the Commission's orders and the unification of control thereunder (R. 531-532). In affirming the Commission's orders, the District Court did not specifically deal with this issue (FEC App. pp. 44a-50a).

It is respectfully submitted that the Commission's orders constitute a restriction on the clear language of Section 5(2)(f). The mandate to the Commission by the language of Section 5(2)(f) is clear and unambiguous. It specifically provides that the Commission shall provide protection to protect the "interests of the railroad employees affected" and for the "employees of the carrier or carriers by railroad affected" by the approved transaction. It does not say, as does the Commission's June 10, 1963, report in the *Southern-Central* case, here adopted by reference (Exhibit D to Complaint; R. 532), that the Commission must protect those railroad employees who are adversely affected "if they are affcted by a coordination and

not by internal economies resulting from the transaction". The statute very simply defines the railroad employees covered by its provisions as those who are "affected" by the transaction.

In *Nebraska Power Company* v. *Omaha Ice & Cold Storage,* 147 Neb. 324, 23 N.W. 2d 312, the Supreme Court of Nebraska held that it is apparent on the face of it, that the word "affected" is "not a word of art, but a word of ordinary English. It is capable of a very large meaning" (23 N.W. 2d at 312). The meaning of the ordinary word "affect" is also defined by Black's Law Dictionary (page 72):

> "To act upon; influence; change; enlarge or abridge; often used in the sense of acting injuriously upon persons or things."

In Section 5(2)(f) the word "affected" is obviously used in the latter sense since the Section speaks of protecting the interests of employees affected. Only employees whose interests are injured would need protection.

Thus, Section 5(2)(f) imposes in plain language the mandate upon the Commission to protect the interests of railroad employees injured by a transaction. The statutory test is not one of the nature of the act taken by the carrier as a result of a transaction, but a factual test of the causal relationship between the employee claiming protection and the transaction, i.e. is the employee "affected" or "injured" by the transaction, which can be decided only in an arbitration of the claims of the individual employee, if denied by the carrier, as such questions have always been decided under Commission practice.

In the twenty-three year history of Section 5(2)(f), the Commission consistently and repeatedly has held that all questions as to the application of particular provisions of protective conditions to particular employees were factual questions to be determined by an arbitrator, each upon its own facts. The Commission's position on this point was clearly stated in *Louisville & Nashville R. Co., et al. Merger,* 312 I.C.C. 676, where after holding that a group of employees were entitled to the benefits of the employee protective conditions imposed therein, the Commission concluded as follows (312 I.C.C. at 684):

> "Questions as to whether, when, and to what extent the terminal employees, or any of them, have been affected as a result of, or in anticipation of, the merger, are not before us; and any dispute as to such matters is to be resolved under the arbitration procedures provided in the prescribed conditions."

Indeed, in the *Southern-Central* case Southern had attempted, as it had in many previous cases, to seek a restriction upon the scope of the protective conditions by excluding therefrom employees who might be affected by "internal economies" or "internal technological improvements" effected "subsequent to the acquisition of control". The Commission rejected that contention in the following language (Compl., Exhibit "B", pp. 21-22; R. 483-484):

> "Applicant takes the position that none of the conditions imposed should afford benefits to employees who may be adversely affected subsequent to the acquisition of control by reason of internal technological improvements and economies effected by Central. It requests that we expressly hold

that the labor conditions prescribed do not apply to employees so affected. This request must be denied. If we approve the transaction, we are required by section 5(2)(f) to include terms and conditions providing that, for a prescribed period, the 'transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment.' In conformity therewith, conditions heretofore prescribed by us and those which will be prescribed herein protect an employee 'if as a result of' the particular transaction he is adversely affected in his employment. We may not by interpretation narrow the scope of the protection intended by the statute. Both the statute and the condition mean what is literally stated, i.e., that an employee is protected against adverse effects suffered in his employment as a result of the transaction. Questions as to whether adverse effects suffered by particular employees in their employment result from the transaction are questions of fact which can be determined under the circumstances of particular cases and must be left for the determination of the arbitrators in case of dispute."

One month later in the *C&O-B&O Control Case,* 317 I.C.C. 261, the identical contention was made by the C&O and it received the identical rejection (317 I.C.C. at 288-289):

"The applicant takes the position that we are not authorized to provide protection for employees affected by the proposed capital improvement program. In considering a somewhat similar contention in the *Southern Control* case we stated: [there follows the quotation from the *Southern-Central* case set forth above].

"Those remarks are equally applicable here."

The Southern raised the contention again on a petition for rehearing and the Commission contrary to twenty-two years of consistent interpretation on this point reversed itself and held (Compl., Exhibit "D", pp. 6-7; R. 531-532):

> "It is plain under the conditions that an employee would be entitled to benefits if adversely affected by a coordination of the operations of applicant and Central or by the shifting of functions from one to the other. However, the effect of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions."

Assuming for the sake of argument that the Commission, upon a proper factual basis, could restrict the protection afforded by the statute and need not justify a reversal of twenty-three years of consistent policy, there are no facts of record in the instant case which justify the restriction of protection accomplished by the June 10 order in the *Southern-Central* case. In fact, the carriers here did not request such a restriction as did Southern in its case and the C&O in its case. Without a specific factual finding to justify such a restriction of protection, the adoption of the June 10 order from the *Southern-Central* case is invalid.

B. THE COMMISSION'S ORDERS ON EMPLOYEE PROTECTION WERE ENTERED WITHOUT ADEQUATE FINDINGS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The actions of the Commission, like those of any other Federal administrative agency, must, of course, be based upon adequate findings supporting its ultimate statutory findings and these must, in turn, be supported by adequate evidence. *Secretary of Agriculture* v. *United States, et al.*, 347 U.S. 645; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 488, 489. This requirement applies to the provisions of Section 5(2)(f), making it mandatory that the Commission provide fair and equitable arrangements to protect adversely affected railroad employees, as well as to the other statutory provisions of Section 5(2).

In the present case, the Association asked the Commission to impose the "New Orleans" conditions with certain modifications (R. 116). The applicants asked the Commission to impose the "New Orleans" conditions without any such modifications (R. 114). The Commission did neither. Instead, it came up with a new set of conditions which it had only recently imposed in the *Southern-Central of Georgia* case. In adopting these conditions which had not been proposed by any appellant in the case, the Commission referred to the modifications in the "New Orleans" conditions proposed by the Association and set forth its reasons for rejecting those modifications. However, the only findings which it made with respect to the conditions which it did impose were the ultimate statutory findings under Section 5(2)(f). It made no subsidiary findings with respect to any changes which it had made in the "New Orleans" conditions other than those relating to the arbitration provision. *Seaboard*

Air Line Railroad Co.—Merger—Atlantic Coast Line Railroad Co., 320 I.C.C. 122, 199-205. The Commission made no subsidiary findings to support the many other departures from the "New Orleans" conditions involved. It, of course, did not have any evidence before it to support such departures because (a) neither party to the proceeding had addressed itself to such conditions, and (b) it would have been physically impossible for any such evidence to be present since the conditions in the *Southern-Central* case were imposed while the present case was pending before the Commission.

The District Court nevertheless affirmed the Commission's orders on the ground that the Commission had used "a shorthand method of saying that, after consideration of all arguments, it applies the same conditions here as in *Southern*" (FEC App. p. 48a). Such a shorthand approach might be justified in a case where there was presented to the Commission the question of whether the conditions which it imposed were adequate and *evidence* and arguments were addressed to that issue. However, in the present case, the Commission, without any argument being addressed at all to such conditions and without one scintilla of evidence being directed to such conditions, simply arbitrarily stated that it would impose the conditions. In the present case, it could have imposed the "New Orleans" conditions without any modifications upon the basis of proper findings and evidence, since the carrier applicants had so requested and had addressed arguments to that request. It would have also imposed the attrition conditions requested by the Association or the "New Orleans" conditions as modified in the proposals of the Association with adequate

findings since evidence and arguments were directed to this issue. However, it had no basis to impose some other conditions to which no evidence or no argument had been directed. The clearest proof of the arbitrary nature of the Commission's action lies in the fact that it made no subsidiary findings to support the conditions imposed by it nor did it refer to a single item of evidence supporting its ultimate statutory findings. As far as anyone is concerned, there is no basis in the Commission's opinion to show why it so acted and the basis therefor.

CONCLUSION

The appellants respectfully submit that this Court has jurisdiction of the appeal and that it presents substantial qustions with respect to the interpretation and application of Section 5(2) (f) of the Interstate Commerce Act. Jurisdiction should be noted.

Respectfully submitted,

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October 6, 1966

APPENDIX A

SERVICE DATE
March 6, 1964

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of March A.D. 1964.

Finance Docket No. 21215

SEABOARD AIR LINE RAILROAD COMPANY—MERGER—
ATLANTIC COAST LINE RAILROAD COMPANY

Finance Docket No. 21254

ATLANTIC COAST LINE RAILROAD COMPANY BONDS

Upon consideration of the record in the above-entitled proceeding, of the petitions, filed January 13, 1964, on behalf of (a) Union Bag-Camp Paper Corporation, (b) Florida East Coast Railway Company, (c) Gulf, Mobile and Ohio Railroad Company, (d) Illinois Central Railroad Company (including request for oral argument), (e) Central of Georgia Railway Company and Savannah & Atlanta Railway Company, (f) Southern Railway Company et al., and (g) Railway Labor Executives' Association, for reconsideration of the report and order of December 2, 1963; and of the reply of applicants, filed February 3, 1964; and

It appearing, That the employee-protective conditions set forth in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, as supplemented in 317 I.C.C. 729, were imposed herein; that on February 27, 1964, the said conditions were clarified; and that such conditions as clarified are, and continue to be, applicable to this proceeding;

It further appearing, That, subject to certain restrictions, the Southern Railway Company operates over a line of the Atlantic Coast Line Railroad Company between

Hardeeville, S. C., and Jacksonville, Fla., via Savannah, Ga., under trackage agreements with the said Atlantic Coast Line Railroad Company; that the said trackage agreements, as interpreted by the parties thereto, may preclude the Southern Railway Company from interchanging freight traffic at Savannah with either Central of Georgia Railway Company or the Savannah & Atlanta Railway Company in connection with movements to, from, or through the Jacksonville gateway;

It further appearing, That Condition 8, relating to the opening of the Jacksonville gateway by the merged company should be clarified and modified to require the Seaboard-Coast Line Railroad Company to provide the Central of Georgia Railway Company, the Savannah & Atlanta Railway Company and other affiliates and subsidiaries of the Southern Railway Company with the right to interchange freight traffic with the Southern Railway Company at Savannah in connection with movements to, from or through the Jacksonville gateway via the Hardeeville-Jacksonville segment;

And it further appearing, That, except as the petitions are granted for the purpose of the modification herein approved, the material matters set forth in the petitions have been considered by the Commission and discussed in its report, that the decision is based on adequate findings supported by the record, that there has been presented no error of fact or law with respect to the matters complained of by petitioners, that no showing has been made warranting reconsideration of the said decision, and that further oral argument is unnecessary:

It is ordered, That the proceeding be, and it is hereby, reopened for reconsideration solely for the purpose of modifying Condition No. 8 of the routing and gateway conditions; and that the said condition be, and it is hereby, modified as follows:

Condition No. 8, after the word "gateway" at the end of Condition No. 8, delete period, insert comma in lieu of period, and add the following:

and, *Provided further* that the Seaboard Coast Line Railroad Company shall take such further action as may be necessary to permit the interchange of freight traffic between Southern Railway Company and Central of Georgia Railway Company, Savannah & Atlanta Railway Company and other affiliates and subsidiaries of the Southern at Savannah in connection with movements to, from, or through the Jacksonville gateway by the Southern Railway Company under existing trackage arrangements permitting operations by that rail carrier between Hardeeville and Jacksonville over a line of the Seaboard Coast Line Railroad Company.

It is further ordered, That in all other respects the said petitions be, and they are hereby, denied.

And it is further ordered, That the order of December 2, 1963, as herein modified, shall become effective from and after 35 days from the date of service.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

APPENDIX B

Statutes Involved

Interstate Commerce Act (49 U.S.C.A.):

1. Section 5(2)(a):

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

2. Section 5(2)(b):

"Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers in-

volved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

3. Section 5(2)(c):

"In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction

upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

4. Section 5(2)(f):

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

APPENDIX C

Section 13 Arbitration Committee

DOCKET NO. 52—*Decision by Referee Gilden*

PARTIES TO DISPUTE
NEW ORLEANS UNION PASSENGER TERMINAL
ILLINOIS CENTRAL RAILROAD COMPANY

v.

RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, SYSTEM FEDERATION NO. 99

QUESTION: (1) That under the current agreement concerning changes in operation at New Orleans, Louisiana, pursuant with Interstate Commerce Commission, Finance Docket No. 15920, and the Washington Job Protection Agreement of May, 1936 furloughed Sheet Metal Worker, J. T. Moore, New Orleans Union Passenger Terminal has been denied compensation he is entitled to under the provisions of the Washington Job Protection Agreement.

(2) That accordingly the Carrier be ordered to compensate the aforesaid furloughed employee for all time lost from February 16, 1955.

FINDINGS: By these actions, Sheet Metal Worker J. T. Moore (Docket 52), and Boilermaker Helper Isiah Spencer (Docket 53), seek recovery of the respective benefits to which they may be entitled under the arrangements imposed January 16, 1952, by the Interstate Commerce Commission in Finance Docket 15920 (for the protection of employees adversely affected by the New Orleans Union Passenger Terminal coordination) and the terms of the subsequent Implementing or Transfer Agreement dated April 10, 1953.

Upon the abolishment of their jobs on the Illinois Central, as a consequence of said coordination, Moore and Spencer were transferred on April 16, 1954, in their re-

spective classifications of Sheet Metal Worker and Boilermaker Helper, to the employ of the NOUPT, on the basis of the formula prescribed in Section 1(b) of said Implementing Agreement, for distributing the available NOUPT job openings among the employees in such class or craft on the various carriers involved. Thereafter, and within approximately ten months from the inception of NOUPT operations on April 16, 1954, both men were furloughed—Moore on February 12, 1955, and Spencer on February 23, 1955.

Lacking a conclusive showing of any appreciable change in the NOUPT's level of activities during the first ten months of its existence, it is apparent that Moore and Spencer's separation, following their brief tenure of NOUPT employment, is just as surely an aspect of the coordination as would be the case if these individuals had not initially been placed on the payroll, and were considered, right from the start, as being adversely affected by the transaction. Clearly, Terminal hirings which plainly bear the imprint of the imponderables of the new venture, and, in a comparatively short time become casualties thereof, are not absolved from the dictates of the ICC's ruling in Finance Docket 15920. Indeed, by safeguarding against a deferred, but nonetheless genuine adverse effect directly attributable to the coordination, Section 6 of the Implementing Agreement specifically preserves the employee's eligibility for said protective conditions. Moreover, the last sentence of this provision makes it clear that these employees qualify for said protective conditions notwithstanding that the adverse effect engendered by their transfer to the Terminal is not discernible until more than sixty days elapsed after such happening.

Significantly, ICC Finance Docket 15920 decreed that the protection afforded by the Washington Agreement (subject to certain limitations on which there is no need to comment at this time) should be extended to all em-

ployees adversely affected by the NOUPT coordination. The claimants herein are entitled to no more or no less than the full extent of such increment. The carrier proposition that the Washington Agreement was superseded by the enactment of Section 5(2)(f) of the Interstate Commerce Act as amended, and is no longer applicable to transactions requiring approval under Section 5(2), has already been rejected by this Committee in Award No. 3, Docket No. 27. In these findings, we adhere to and expressly reaffirm the validity of that conclusion. In furtherance thereof, we hold that the asserted jurisdictional deficiency on the part of this Committee and the Referee appointed thereto to decide this dispute is without substance. (Emphasis Supplied).

DECISION: 1. That the Illinois Central Railroad Company shall forthwith remunerate Sheet Metal Worker J. T. Moore with the compensation accruing to him under the terms of the "Agreement of May, 1936, Washington, D. C." subject to the limitations on such recovery affixed on January 16, 1952, by the Interstate Commerce Commission in Finance Docket 15920.

2. That the Illinois Central Railroad Company shall forthwith remunerate Boilermaker Helper Isiah Spencer with the compensation accruing to him under the terms of the "Agreement of May, 1936, Washington, D. C.", subject to the limitations on such recovery affixed on January 16, 1952, by the Interstate Commerce Commission in Finance Docket 15920.

APPENDIX D

Section 13 Arbitration Committee

DOCKET No. 53—*Decision by Referee Gilden*

PARTIES TO DISPUTE
NEW ORLEANS PASSENGER TERMINAL
AND ILLINOIS CENTRAL RAILROAD COMPANY

v.

RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, SYSTEM FEDERATION No. 99

QUESTION: Isiah Spencer, Boilermaker Helper, New Orleans Passenger Terminal has been unjustly denied compensation due him under the provisions of Interstate Commerce Commission Finance Docket 15920 and the Washington Job Protection Agreement of May, 1936.

That accordingly the Carrier be ordered to compensate Isiah Spencer in accordance with Interstate Commerce Commission Finance Docket 15920 and Washington Job Protection Agreement of May, 1936.

FINDINGS: Identical to Findings in Docket No. 52.

DECISION: 1. That the Illinois Central Railroad Company shall forthwith remunerate Sheet Metal Worker J. T. Moore with the compensation accruing to him under the terms of the "Agreement of May, 1936, Washington, D. C." subject to the limitations on such recovery affixed on January 16, 1952, by the Interstate Commerce Commission in Finance Docket 15920.

2. That the Illinois Central Railroad Company shall forthwith remunerate Boilermaker Helper Isiah Spencer with the compensation accruing to him under the terms of the "Agreement of May, 1936, Washington, D. C.", subject to the limitations on such recovery affixed on January 16, 1952, by the Interstate Commerce Commission in Finance Docket 15920.